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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/595,363	07/24/2006	Stephanie Blanche	112701-717	8221

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EXAMINER

GWARTNEY, ELIZABETH A

ART UNIT	PAPER NUMBER
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1794

NOTIFICATION DATE	DELIVERY MODE
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12/23/2008

ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

PATENTS@BELLBOYD.COM

Office Action Summary	Application No. 10/595,363	Applicant(s) BLANCHE ET AL.	
	Examiner Elizabeth Gwartney	Art Unit 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-18 is/are pending in the application.
 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-18 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
 a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. ____.
 3. ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. ____. |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>20061115</u> . | 6) <input type="checkbox"/> Other: ____. |

DETAILED ACTION

Claim Rejections - 35 USC § 112

1. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

2. Claims 2 and 7 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Regarding claim 2, the recitation "the source of fat" renders the claim indefinite. Given that claim 1 recites "at least one source of fat present in the form of discrete particles", it is not clear whether "the source of fat" refers to fat present as discrete particles or to any fat present in the mixture. Clarification is requested.

Regarding claim 7, the addition of the word "type" extends the scope of the claims so as to render them indefinite since it is unclear what "type" is intended to convey. The addition of the word "type" to the otherwise definite expression renders the definite expression indefinite by extending its scope. *Ex parte Copenhaver*, 109 USPQ 118 (Bd. App. 1955).

Claim Rejections - 35 USC § 102

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

((b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

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4. Claims 1-2, 4-5, 7 and 13-14 are rejected under 35 U.S.C. 102(b) as being anticipated by Drantch et al. (US 2003/0003213).

Regarding claim 1, Drantch et al. disclose a ready-to-bake dough ([0013]) or batter mixture ([0040]) that is fluid (*see* “batter” -generally thin enough to pour – [0031]) and shelf stable for six to eight months ([0039], [0044], [0081]) comprising a continuous mixture comprising flour, water and sugar ([0031],[0047], [0051]), having a Aw of between 0.65 and 0.85 ([0044]) and chocolate chips (i.e. fat in the form of discrete particles – [0020]- [0022], [0039]).

Given that Drantch et al. disclose a dough or batter that is shelf stable for six to eight months, it necessarily follows that the dough or batter would be stable for several weeks in refrigerated form.

Regarding claim 2, Drantch et al. disclose all of the claim limitations as set forth above is selected from the group consisting of cocoa butter and chocolate ([0022]-[0023]).

Regarding claim 4, Drantch et al. disclose a method for preparing a mixture comprising using chocolate chips (i.e. a source of fat in the form of discrete particles) distributed in a continuous phase of refrigerated fluid mixture (*see* “batter” -generally thin enough to pour – [0031], *see* refrigerated dough - [0063], claim 33) comprising flour, water, and sugar ([0031],[0047],[0051]). Given that Drantch et al. disclose a mixture identical to that presently claimed, it is clear that the mixture would inherently be fluid so as to flow at refrigerated temperature during transfer from its packaging into a baking mold (*see also* “batter” – generally thin enough to pour, [0031]).

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Regarding claim 5, Drantch et al. disclose all of the claim limitations as set forth above and that the total fat content of the mixture including the particles is from about 10.27% to about 39.8% (given that the dough or batter comprises 10-30% fat and 1-35% chocolate chips, since chocolate chips contain 27-28% cocoa butter, the total fat content of the dough or batter ranges from 10.27% to 39.8% - [0008], [0022]-[0025]).

Regarding claim 7, Drantch et al. disclose a method for making baking goods comprising the steps of: (a) providing a batter comprising water, flour and sugar ([0031],[0047], [0051]), which is shelf stable for six to eight months ([0039], [0044], [0081]) , having a Aw of between 0.65-0.85 ([0044]) and chocolate chips (i.e. one source of fat present in the form of discrete particles – [0022]-[0023], [0039]) distributed in the mixture; (b) adding the mixture to a pan (i.e. pouring into a mold - [0077]); (c) baking the mixture ([0077]); (d) and a finished baked good ready for immediate consumption ([0078]).

Given that Drantch et al. disclose a dough or batter that is shelf stable for six to eight months, it necessarily follows that the dough or batter would be stable for several weeks in refrigerated form.

Given that Drantch et al. disclose a method for making a baked good identical to the present invention, it is clear that the baked good would have a fondant interior as presently claimed.

Regarding claims 13-14, Drantch et al. disclose all of the claim limitations as set forth above and that the total fat content of the mixture including the particles ranges from about 10.27% to about 39.8% (given that the dough or batter comprises 10-30% fat and 1-35%

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chocolate chips, since chocolate chips contain 27-28% cocoa butter, the total fat content of the dough or batter ranges from 10.27% to 39.8% - [0008], [0022]-[0025]).

Claim Rejections - 35 USC § 103

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

7. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

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8. Claims 3, 6, 8-12, and 15-18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Drantch et al. (US 2003/0003213).

Regarding claims 3, 6, 9-12 and 15-18, Drantch et al. disclose all of the claim limitations as set forth above. While Drantch et al. disclose that the chocolate chips represent up to 49.5% of the total fat contained in dough or batter (given that the dough or batter comprises 10-30% fat and 1-35% chocolate chips, since chocolate chips contain 27-28% cocoa butter, the total fat content of the dough or batter ranges from 10.27% to 39.8% - [0008], [0022]-[0025] – therefore, the most fat the chocolate chips could represent is 9.8/19.8 or 49.5%), the reference does not explicitly disclose that the chocolate chips represent at least 60%, 70%, 80%, 90%, or 95% of the total fat contained in the dough or batter mixture. As chocolate flavor and product texture (i.e. density) are variables that can be modified, among others, by adjusting the ratio of chocolate chips in the total fat of the product, the precise amount of chocolate chips in the mixture would have been considered a result effective variable by one of ordinary skill in the art at the time of the invention. As such, without showing unexpected results, the claimed ratio of chocolate chips in the total fat of the mixture cannot be considered critical. Accordingly, one of ordinary skill in the art at the time the invention was made would have optimized, by routine experimentation, the amount of chocolate chips making up the total fat in the dough and batter mixture of Drantch et al. to obtain the desired balance between baked product density and chocolate flavor (*In re Boesch*, 617 F.2d. 272, 205 USPQ 215 (CCPA 1980)), since it has been held that where the general conditions of the claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. (*In re Aller*, 105 USPQ 223).

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Regarding claim 8, Drantch et al. disclose all of the claim limitations as set forth above but does not disclose that the source of fat is hydrogenated palm oil. Given that Drantch et al. disclose that a source of fat is chocolate chips or confectionery fat (i.e. fats with hard consistency and are solid at room temperature) wherein the fats are solid at room temperature, it would have been obvious to one of ordinary skill in the art at the time of the invention to have used any form of a fat that is solid at room temperature, including hydrogenated palm oil, and arrive at the invention as presently claimed.

Conclusion

9. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Narayanaswamy et al. (WO 00/72687) teach a shelf stable brownie batter comprising flour, sugar, water and discrete particles of fat (i.e. an emulsion).

Pelloso et al. (EP 0 163 496) teach a baked good with a soft flavor chip wherein the soft flavor chip comprises a softening fat. The reference does not disclose the stability and Aw of the mixture.

10. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Elizabeth Gwartney whose telephone number is (571) 270-3874. The examiner can normally be reached on Monday - Thursday; 7:30AM - 5:00PM EST, working alternate Fridays.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Callie Shosho can be reached on (571) 272-1123. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/E. G./

Examiner, Art Unit 1794

/Callie E. Shosho/

Supervisory Patent Examiner, Art Unit 1794